

No. 11621.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GROVER J. ELLIS,

Appellant,

vs.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, a corpor-
ation,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

JUN - 7 1947

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Jurisdictional Statement.

This is an appeal from a final decree of Dismissal entered by the United States District Court for the Southern District of California, Central Division, in an action for maintenance and cure and wages, arising out of injuries sustained by Grover J. Ellis, third assistant engineer on the S. S. "Cape Saunders," August 7, 1945, at Manila, P. I., while appellant was on shore leave at the United Seamans Service Club.

The pleadings in the District Court were a Libel *In Personam* for Wages, Maintenance and Repatriation [Ap. 3.] Answer of American Hawaiian Steamship Company. [Ap. 7.]

A trial was had before the United States District Court, with the Honorable Peirson M. Hall, judge presiding. After hearing the evidence, oral and depositions, together with other written documents, proctors for libellant and respondent argued the case. The Honorable Judge then found in favor of the respondent and entered a Decree of Dismissal.

Findings of Facts and Conclusions of Law were signed and filed on March 3, 1947. [Ap. 15.] Proposed Amendments to the Findings of Fact and Conclusions of Law having been filed on February 27, 1947. [Ap. 13.]

Final Decree was entered on March 3, 1947. [Ap. 20.]

The Apostles on Appeal, certified by the Clerk of the District Court, include the following: Petition for Order Allowing Appeal Without Bond, and Points and Authorities [Ap. 22]; Assignment of Errors [Ap. 24]; Order Allowing Appeal Without Furnishing Bond or Costs [Ap. 29]; Notice of Appeal [Ap. 30]; and *Praecipe* [Ap. 31]. An order extending time of filing Apostles on Appeal was filed April 29, 1947. [Ap. 33.]

The jurisdiction of the District Court over actions, civil and maritime, involving claims for wages, maintenance and cure, arises from Article III, Sections 1 and 2 of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish, and that such power shall extend to all civil causes of admiralty and maritime jurisdiction.

Jurisdiction of civil causes of admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, Chapter 20, Sections 9, 11; 1 Stat. L. 76, 78; 28 U. S. C. A., Section 371.

Appeals from final decrees in admiralty are authorized by Section 128a of the Judicial Code, as amended May 9, 1942 (56 Stat. L. 272, 28 U. S. C. A., Sec. 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review, by appeal, final decisions.

Statement of the Case.

The facts are practically undisputed. On August 11, 1945, the appellant was employed on the S.S. "Cape Saunders," as third assistant engineer, at Los Angeles, California, for a voyage not to exceed 12 months. His base pay was \$202.00 per month, room and board, and overtime. [Ap. 53, 54.]

On October 4, 1945, the S.S. "Cape Saunders" was anchored in Manila Bay. About 12 o'clock, noon, the appellant, with the first assistant engineer, left the "Cape Saunders" on shore leave. [Ap. 41, 42.] Appellant, with the first assistant, left his ship for the United Seamans Service Club after seeing a notice on the bulletin board of the vessel that this club was the only place a seaman could go for recreational purposes. [Ap. 41, 121.]

Appellant and the first assistant engineer hitch-hiked to the Club, a distance of about eight to ten miles. [Ap. 41. 60. 61.]

After having been at the United Service Seamans Club about an hour and one-half, during which time appellant and Mr. Stone, the first assistant, drank some beer, appellant and Mr. Stone rented bathing suits from the United Seamans Service Club and went swimming in the swimming pool maintained at the Club. [Ap. 42, 43.]

Both Mr. Stone and appellant were diving from the springboard in the pool, although the pool was not completely full, nor were there signs indicating that the pool should not be used, nor were they advised that they should not use the pool. [Ap. 43, 48.]

After appellant had followed the first assistant Stone in making several dives from the springboard in the swimming pool, appellant struck his head a glancing blow on the bottom of the pool, and sustained a fractured vertebrae. [Ap. 43, 39, 40.]

Appellant was immediately hospitalized, and repatriated to San Francisco on November 18, 1945. [Ap. 44, 45.] He was hospitalized in the Marine Hospital at San Francisco from November 18, 1945, to January 6, 1946. [Ap. 39.] On January 28, 1946, appellant was admitted to outpatient care in the United States Public Health Service at Los Angeles, California, and so remained at December 6, 1946. [Ap. 40.] However, appellant returned to remunerative employment on October 1, 1946. [Ap. 45.]

It was stipulated by the parties that had the appellant remained on the Cape Saunders until the termination of

its voyage, appellant would have earned \$464.60 as base pay. [Ap. 36.] The voyage terminated on December 13, 1945. [Ap. 54.] It was further stipulated that the reasonable cost of repatriation of the appellant from San Francisco to Los Angeles, the point of shipment, was \$20.00. [Ap. 36.]

War Shipping Administration Operations Regulation No. 108, provided that licensed personnel shall be paid maintenance of not less than \$4.00 or more than \$6.50 per day. [Ap. 86.]

The S.S. "Cape Saunders" was owned by the United States and operated by and through the War Shipping Administration, with the American Hawaiian Steamship Company, the General Agents in the operation of the vessel. [Ap. 73, 74.]

The District Court found that Grover J. Ellis was employed as the third assistant engineer at base pay of \$202.00 per month, for the voyage in question of the S.S. "Cape Saunders." That he sustained certain injuries when diving in the swimming pool of the Seaman's Club in Manila, October 4, 1945. The Court further found that the injuries so sustained were the result of libelant's wilful misconduct and were sustained outside the scope and course of his employment. [Ap. 14-18.]

The District Court further found that libelant incurred expenses in the sum of \$20.00 for his repatriation to Los Angeles, from the San Francisco Marine Hospital. [Ap. 18.]

From the Findings of Facts, the Court concluded that the libelant was entitled to recover nothing.

Assignment of Errors.

The assignment of errors upon which the appellant relies are set forth in the Appendix to this brief, and are summarized in the following statement of points involved in this appeal:

1. Is a seaman within the scope and course of his employment during the period of time he is using facilities maintained some eight miles from the harbor exclusively for the recreation of members of our Merchant Marine, during a period he was on shore leave, and was warned by his employer to go no other place for recreation while ashore?

2. Is it wilful misconduct upon the part of a seaman to use the facilities provided for him by the United Seaman's Service Club, when they are used in the accepted manner?

3. Is an injured seaman entitled to receive the costs of his repatriation to the point of his shipment when injured during the voyage for which he was employed and which required hospitalization until after the voyage terminated?

ARGUMENT.

I.

This Appeal Is a Trial de Novo.

Citation of authority in the Ninth Circuit is no longer necessary upon this point.

II.

Is a Seaman Within the Scope and Course of His Employment During the Period of Time He Is Using Facilities Maintained Some Eight Miles From the Harbor Exclusively for the Recreation of Members of Our Merchant Marine, During a Period of Time He Was Warned to Go No Other Place for Recreation While Ashore?

This point has been given considerable attention by our courts, commencing with the case of *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 87 L. ed. 1107, 1943 A.M.C. 451. While in one of the cases then before the Court, the injured seaman was half a mile from his vessel, it was held that he was entitled to his maintenance although struck by an automobile while the injured seaman was upon personal business. In this case the Court reasoned as follows:

“To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seamen hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are ‘exclusively personal’ and have no relation to the vessel’s business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discip-

line. * * * In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely personal diversion.”

This same reasoning was followed by Judge Murphy in *Moss v. Alaska Packers Ass'n.*, 70 Cal. App. (2d) 857, 1945 A.M.C. 493. In this case, Moss, the Deck Engineer on the S.S. “Homer Lee” was ashore on leave at Hobart, Tasmania. After having had five drinks of straight scotch whiskey at a bar at Hobart, he was struck on the head by persons unknown. He required hospitalization in Tasmania and was separated from his ship by reason of his injuries. He was repatriated to the United States and instituted an action for wages, transportation, maintenance and cure, after leaving the S.S. “Homer Lee.” In short, almost identical to the case at bar. The Court held that the philosophy of the *Aguilar* case, *supra*, was sound, and that the seaman was entitled to so recover his wages, transportation, maintenance and cure.

Likewise, the Municipal Court of the City of New York, in *Taylor v. United Fruit Company*, 1947 A.M.C. 165, held that a stand-by seaman who was injured in the street near his home while on his way there for the week-end, was entitled to recover his maintenance, cure and wages during his disability.

The foregoing cases follow the reasoning of the United States Supreme Court in *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424, 83 L. ed. 424, 1939 A.M.C. 1, wherein the Court stated:

“Seamen are the wards of admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the

special circumstances attending their calling. * * *
It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end.”

The same liberal construction compels the finding that the injuries sustained by the appellant herein were such as would entitle him to the protection of the laws enacted for the benefit and protection of seamen.

III.

Is It Wilful Misconduct Upon the Part of a Seaman to Use Facilities Provided for Him by the United Seaman's Service Club, When They Are Used in the Accepted Manner?

Upon the bulletin board of the S.S. “Cape Saunders” there was a printed notice advising the members of the crew that the water, drinks and food in the City of Manila were contaminated, but there was a Seaman's Club to which they could go that provided food, beer, games, swimming pool and reading rooms.

The appellant went to this Club. After he had three bottles of beer during a period of an hour and one-half, he rented some trunks from the Club, together with another member of the crew of his vessel, and went swimming. These two men had been swimming for about twenty minutes. Stone, the First Assistant Engineer, dove from the springboard into the pool several times. The appellant on each occasion followed Stone. The pool was not fully filled. At the point the appellant came up from his dive, the water was between three and four feet deep. The springboard was located over the deep end, and they dove in the direction of the shallow end of the pool. Aft-

er having used the board several times, appellant struck his head with a glancing blow on the bottom of the pool. He sustained injuries which turned out to have been quite serious.

The finding of the lower Court, with respect to this conduct, is a question of law, and not one of fact. It is respectfully submitted that these facts do not constitute wilful misconduct upon the part of the appellant. While a pool full of water would give greater protection to a diver, the evidence in this case that others were using the springboard at the time, together with the facts that trunks were being rented to men for use in the swimming pool and no warning or notice given that it was unsafe to use the springboard, would seem to be conclusive that the use of the springboard did not constitute wilful misconduct, or even misconduct upon the part of the appellant.

There is no evidence in the record as to the depth of the water at the point of entry into the water. There is the evidence that the springboard was situated at the deep end of the pool.

It seems that the reasoning of Judge Stephens in *Sundberg v. Washington Fish & Oyster Co.*, 138 F. (2d) 801, is controlling in the case at bar. In that case the Court held in following the *Aguilar* case, *supra*:

“Appropriately it (liability) covers all injuries and ailments incurred without misconduct on the seaman’s part amounting to ground for forfeiture, at least while he is on the ship, ‘subject to the call of duty as a seaman, and earning wages as such.’”

Certainly the conduct of the seaman in this case could not be said to be such as would be ground for his being logged. Had he gone out and become infected with a

venereal disease, and was unable to resume his employment for a period of time by reason thereof, he properly should be logged. So would be the case of a seaman becoming intoxicated on shore and who received disabling injuries in a drunken brawl that resulted from his intoxication.

In the case at bar we have an injury sustained while engaged in a clean and wholesome sport at a place recommended by the employer.

IV.

Is an Injured Seaman Entitled to Receive the Costs of His Repatriation to the Point of Shipment, When Injured During the Voyage for Which He Was Employed and Which Required Hospitalization Until After the Voyage Terminated?

The cases seem to be without exception that an injured seaman is entitled to his repatriation expense. They are as follows:

Allen v. S. S. Hawaiian, 53 Fed. Supp. 985;

Miller v. United States, 51 Fed. Supp. 924;

The Centennial, 10 Fed. 397; and

The William Penn (E. D. N. Y.), 1925 A. M. C. 1316.

It would neither be consonant with the liberality which courts of admiralty have displayed towards seamen, who are their wards, nor with the doctrine of sound maritime policy to permit injured seamen to become stranded, without funds with which to return to their port of shipment. The obligation of the employer is not terminated by his returning the injured seaman to any port in the United States.

Conclusion.

It is respectfully submitted that the judgment of the United States District Court in this case be reversed so as to permit the recovery by the appellant of his wages to the end of the voyage, in the sum of \$464.60, less withholding and Social Security taxes; together with his maintenance at the rate of \$5.50 per day from January 6 to September 30, 1946, a total sum of \$1,474.00 and for his repatriation expense in the sum of \$20.00.

Respectfully submitted,

DAVID A. FALL,

Proctor for Appellant.

APPENDIX.

Assignments of Errors.

I.

The District Court erred in not finding that on the 4th day of October, 1945, when the S. S. "Cape Saunders" was anchored in Port of Manila, Phillipine Islands, in the course of her said voyage, the libelant went ashore on leave from said vessel to the United Service Seaman's Club, a club maintained for the use of American merchant seamen, exclusively; and that libelant sustained injuries consisting of a fracture of the vertebrae while diving in the swimming pool maintained by said club after he had rented trunks from said club for use in swimming in the pool maintained and operated by said club.

II.

That the District Court erred in not finding that by reason of the injuries sustained by the libelant, while ashore in Manila, he was permanently disabled from the 4th day of October, 1945, to and including the 30th day of September, 1946, and that said injuries, while sustained ashore, were sustained while libelant was engaged in activities incident to his employment.

III.

The District Court erred in not finding that libelant was entitled to his wages from the 5th day of October, 1945, to and including the 13th day of December, 1945, the day upon which the S. S. "Cape Saunders" completed the voyage for which libelant had been employed as a member of its crew.

IV.

The District Court erred in not finding that the libelant was entitled to recover the sum of \$464.60 wages which he would have earned from the 5th day of October, 1945, to and including the 13th day of December, 1945, on the S. S. "Cape Saunders."

V.

That the District Court erred in not finding that the libelant was entitled to recover his repatriation costs from San Francisco, California, to the Port of Los Angeles, California, the port of his shipment aboard the S. S. "Cape Saunders," in the sum of \$20.00.

VI.

That the District Court erred in not finding that the libelant was entitled to recover from respondent the sum of \$20.00, the cost of his repatriation from the port he was repatriated to the United States to the port of his shipment aboard the S. S. "Cape Saunders."

VII.

That the District Court erred in not finding that the libelant was entitled to recover the sum of \$5.50 per day maintenance from the 6th day of January, 1946, to and including the 30th day of September, 1946.

VIII.

That the District Court erred in not finding that the libelant was entitled to recover the sum of \$1474.00 maintenance from the 6th day of January, 1946, to and including the 30th day of September, 1946.

IX.

That the District Court erred in finding that libelant went ashore on the 4th day of October, 1945, on his own initiative and for personal reasons not connected with his employment on board the S. S. "Cape Saunders."

X.

That the District Court erred in finding that libelant was an experienced swimmer and diver and knew or should have known that the depth of the water in the pool was insufficient to enable him to dive from said spring-board with safety; that the District Court in connection therewith erred in finding that the libelant wilfully and recklessly dove in the said pool when the water was too shallow to permit diving, and under such circumstances knew or should have known that injury was virtually inevitable.

XI.

That the District Court erred in finding that the libelant did or should have realized the personal risk entailed in the probable consequences in the dive he made into the pool from which he sustained his injuries.

XII.

That the District Court erred in finding that libelant's injuries and resulting damages were solely and proximately caused by libelant's wilful misconduct.

XIII.

That the District Court erred in finding that libelant's injuries were sustained outside the scope and course of his employment.

XIV.

That the District Court erred in not finding that the injuries sustained by the libelant were sustained by him while engaged in activities incident to the service to his ship, and therefore were in the service of his ship.

XV.

That the District Court erred in holding that the libelant recover nothing from respondent American Hawaiian Steamship Company, a corporation.

XVI.

That the District Court erred in dismissing the libel of this libelant.

XVII.

That the District Court erred in not holding that libelant is entitled to recover judgment against respondent in the sum of \$1,958.63, with interest thereon from the dates his wages, maintenance, and repatriation were due and payable.